Supreme Court, U.S.
FILED
APR 16 1971

In the Supreme Court
OF THE
United States

70-125

OCTOBER TERM, 1970

No. ———

CITY OF CARMEL-BY-THE-SEA, A Municipal Corporation, THE PEOPLE, Real Party in Interest,
Petitioner

vs.

ANN KESSINGER PARR,
Respondent

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California

WILLIAM B. BURLEIGH,
City Attorney for City of Carmel-by-the-Sea;
P. O. Box 805,
Carmel, California 93921,
Telephone: (408) 624-5339,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO. SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Citation to opinions below	1
Jurisdiction	2
The questions presented	2
Constitutional provision and ordinance involved	3
Statement of the case	3
Reasons for granting the writ	6
I	
Mild disapproval of a destructive or disorderly class or group of individuals by a legislative body should not invalidate neutral and necessary laws	8
II	
An expression of mild disapproval directed toward a class or group, such as hippies, by a legislative body, should not create a presumption that a neutral ordinance will be arbitrarily and discriminately enforced by police officials solely against that group	14
III	
A city should not be forever prohibited from legislating in an area that affects a class or a group, as well as all others merely because the legislative body holds the class or group in disfavor	16
Conclusion	18

Table of Appendices

	Page
Appendix A—Opinion of the Supreme Court of California	i
Appendix B—Opinion of the Court of Appeal	xxiii
Appendix C—Minute Order of Superior Court of California, County of Monterey	xxix
Appendix D—Ordinance Involved	xxx

Table of Authorities Cited

Cases

Pages

City of Banning v. Desert Outdoor Advertising, Inc., 209 Cal. App. 2d 152 16

Parr v. Municipal Court, 3 Cal. 3d 861 ..... 6, 11, 12, 15, 17

United States v. O'Brien, 391 U.S. 367 11

Codes

Government Code:
Section 36937 4

City of Carmel-by-the-Sea Municipal Code:
Section 697.02 ..... 3, 10
Section 697.02(2)b 4, 5

Constitutions

United States Constitution, 14th Amendment ... 2, 3, 5, 6, 7, 16, 18

Statutes

28 U.S.C. 1257(3) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

CITY OF CARMEL-BY-THE-SEA, a Municipal Corporation, THE PEOPLE, Real Party in Interest,

Petitioner,

vs.

ANN KESSINGER PARR,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered on January 18, 1971.

CITATION TO OPINIONS BELOW

The minute order of the Superior Court of the State of California, for the County of Monterey,

denying Respondent's Petition for Alternative Writ of Prohibition to prohibit the trial of Respondent, thereby upholding the city ordinance of Petitioner is printed in Appendix C hereto. The opinion of the Court of Appeal of the State of California affirming the judgment of the Superior Court is printed in Appendix B hereto. The opinion of the Supreme Court of the State of California reversing the Court of Appeal is printed in Appendix A hereto and is reported in the official reports at 3 Cal. 3d 861; ..... Cal. Rptr. .....; ..... P. 2d .....

JURISDICTION

The judgment of the Supreme Court of the State of California was made and entered January 18, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), in that the highest court of a state rendered a final judgment concerning the validity of a state statute drawn in question on the ground of its being repugnant to the U.S. Constitution.

THE QUESTIONS PRESENTED

1. Does mild disapproval of a destructive or disorderly class or group of individuals by a legislative body invalidate otherwise necessary and neutral legislation? Are legislative bodies prohibited by the Fourteenth Amendment from legislating against a wrong being committed by a class?

2. Does a mere declaratory statement of mild disapproval directed toward a destructive or disorderly class or group of individuals, such as hippies, by the legislative body of a City, create a presumption that a neutral ordinance will be arbitrarily and discriminately enforced by the police officials against that class or group?

3. Should a city be forever prohibited from legislating in an area that affects a class or a group, as well as all others, merely because the legislative body holds the class or group in mild disfavor at a time when the class or group is causing a crisis?

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The constitutional provision involved is the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.

The City ordinance involved is Section 697.02 of the Municipal Code of the City of Carmel-by-the-Sea, set forth in Appendix D.

STATEMENT OF THE CASE

The City Council of the City of Carmel-by-the-Sea, State of California, on July 31, 1968, amended the Municipal Code of the City by the addition of Divi-

sion 14, entitled "REGULATION OF CONDUCT ON PUBLIC PROPERTY". The amendatory ordinance first set forth a definition of public property, and then provided, as pertinent to this writ:

> "ON ANY PUBLIC PROPERTY IT SHALL BE UNLAWFUL FOR ANY PERSON TO:
>
> ". . . (b) climb any trees, or walk, stand or sit upon monuments, vases, fountains, railings, fences, planted areas, or upon any other property not designed or customarily used for such purposes, or to sit on any sidewalks or steps, or to lie or sit on any lawns." (C.T. 35)

The adopting ordinance was accompanied by an independent Statement of Facts called a Declaration of Urgency, designed pursuant to California Government Code Section 36937, to make the amendatory ordinance effective immediately, rather than the customary thirtieth day after passage. The non-regulatory Declaration provides:

> "This is an urgency ordinance adopted to preserve the public peace and safety pursuant to Government Code Section 36937, and shall take effect immediately. The City Council of the City of Carmel-by-the-Sea has observed an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as 'hippies', and finds that unless proper regulations are adopted immediately, the use and enjoyment of public property will be jeopardized if not entirely eliminated; the public parks and beaches are, in many cases, rendered unfit for normal public use by the unregulated and uncontrolled conduct of the new transients." (C.T. 33)

On August 18, 1968, respondent, a local Carmel merchant, was arrested for violation of the above numbered section. (C.T. 38, 1, 5)

On August 19, 1968, a complaint was filed charging respondent with violation of Section 697.02(2)b of the Municipal Code of the City of Carmel-by-the-Sea, a misdemeanor, to wit: sitting on the lawn in Devendorf Plaza. (C.T. 21)

On August 26, 1968, respondent filed a demurrer to the complaint alleging that said ordinance was class legislation and in violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution, (C.T. 22-31) and on August 29, 1968, the Municipal Court, Judge Eugene Harrah presiding, overruled respondent's demurrer. (C.T. 2)

Respondent then filed, on October 15, 1968, a petition for an Alternative Writ of Prohibition again alleging, inter alia, that said ordinance violated the Equal Protection Clause of the 14th Amendment, to restrain the Municipal Court from proceeding with the trial. The Superior Court issued an Alternative Writ on October 15, 1968 (C.T. 40-41), setting the hearing for November 1, 1968. On that date the petition for a Peremptory Writ was denied, (C.T. 56), the Court thereby holding that the ordinance was not unconstitutional as tested by the Equal Protection Clause of the 14th Amendment.

Notice of Appeal from the order denying the Peremptory Writ was filed on December 12, 1968. (C.T. 58).

The Court of Appeal affirmed the judgment of the Superior Court on March 23, 1970, thereby affirming the lower court and upholding the ordinance. Respondent's Petition for Rehearing in the Court of Appeal was denied April 22, 1970.

On May 1, 1970, respondent's Petition for Hearing by the Supreme Court of the State of California was filed, and was granted on May 21, 1970. The Supreme Court of the State of California, on January 18, 1971, reversed the Court of Appeal, holding that the ordinance was in violation of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. *Parr v. Municipal Court,* 3 Cal. 3d 861, at 871. The California Supreme Court in reversing the Court of Appeal directed the Superior Court to issue the peremptory writ of prohibition as prayed.

REASONS FOR GRANTING THE WRIT

Municipalities, sometimes embattled, are seeking ways to protect themselves from property destruction and public injuries and to protect the health and safety of their citizens. In some cases the damage is done by a class or identifiable group of people, such as Students for a Democratic Society, Black Panthers, or super-patriotic societies. In our dynamic social structure cities are constantly alert to ever-changing, ever-challenging problems. Cities must be aware and flexible. In some cases, the facts which prompt the need for action by the city legislative body indicate that the problem has been created by or the

damage is being done by a class of disorderly persons or a readily identifiable group of people active in political or social movements.

In the case at bar, the City of Carmel sought to protect the park from an "extraordinary influx" (C.T. 33) of a social class known as "hippies", by prohibiting *all persons* from sitting on the lawn in the city's only public park. By prohibiting *all persons* from sitting on the grass, abuse of the park would be, and was, greatly reduced.

The Supreme Court of the State of California by a 4-3 decision has ruled that if a wrong is being committed by a class or a group, a legislative body cannot enact laws prohibiting that wrong if it is even mildly hostile to the class or group; to do so is discriminatory and in violation of the Equal Protection Clause of the United States Constitution. If this be the case, the majority of the California Supreme Court has apparently misinterpreted guidelines established by this Court.

Many other states look to the highest State courts for precedent, often California's, when no precedents have been established by this Court.

If this Court does not grant this Writ of Certiorari, and reverse the opinion of the California Supreme Court, untold legislation throughout the State of California and many other states, will be jeopardized and restricted. To deny this writ will serve to encourage application of the California decision in many areas, thereby sanctioning continued destruction of property and potential injuries to persons. The reasoning of

the California case could be used to destroy countless needed regulations, such as trespass, glue-sniffing, drug abuse and gun legislation. The City of Carmel is by this decision prohibited from legislating against littering, disfiguration of public facilities, cutting down public trees, and many other urgent problems.

I

MILD DISAPPROVAL OF A DESTRUCTIVE OR DISORDERLY CLASS OR GROUP OF INDIVIDUALS BY A LEGISLATIVE BODY SHOULD NOT INVALIDATE NEUTRAL AND NECESSARY LAWS.

In the summer of 1968, the City of Carmel was unexpectedly overwhelmed by the immigration of a new social phenomena known loosely as "hippies". This immigration was referred to by the City Council in its Declaration of Urgency as an "extraordinary influx". (C.T. 33)[1]

The disturbed City Council of Carmel found that the public parks and beaches were "rendered unfit for normal public use" because of the conduct—unregulated and uncontrolled—of the new transients. (C.T. 33) The Council was faced with the potential of complete elimination of the use of the public parks. (C.T. 33) Obviously, this presupposes that there would be considerable destruction and misuse of the parks. This can be expected, not only from the

[1]The Declaration of Urgency is a mere statement of facts, non-regulatory, and not part of the law. Its purpose is to set the operative, effective date of the amendment of the ordinance.

transient force such as "hippies" but from any extremely large group of people. The park in Carmel, known as Devendorf Plaza, is very small and is designed primarily for pleasant relaxation and not mass rallies and large meetings. Although meetings have been held in the past, and are being held at present and will be in the future, the park will simply not accommodate unusually large numbers of people.

In any extremely large group, it is likely that a small percentage will be destructive. Such was the case in Carmel; the park—and other public areas—such as landscaped sidewalks, were being systematically, if not intentionally, destroyed. As the Council said, the use and enjoyment of public property was being jeopardized if not entirely eliminated. (C.T. 33) The Council took immediate action, via the Declaration of Urgency; if it had waited the customary 30 days, irreparable damage would have occurred.[2]

It obviously follows that the best and most effective way to protect grass (and other growth such as bushes) is to reduce its use. An effective way to reduce the actual use of the grass was to prohibit sitting upon it. The excessive use of the grass prior to the adoption of the ordinance was smothering it. By permitting anyone to walk upon the grass, but prohibiting them from lying or sitting upon it, helped to reduce the amount of abuse. Thus, the City Council

[2]Ironically, if the Council had waited the customary 30 days, the ordinance would no doubt have been held valid because there would have been no Declaration of Urgency that referred to Hippies.

adopted Section 697.02 of the Municipal Code, which provides that on public property it shall be unlawful for any person to sit on a lawn. That was the provision challenged in the instant case.

The California Supreme Court determined that the ordinance, prohibiting *all persons* from sitting on the lawn, was void as discriminatory because of the facts stated in the declaration of urgency that preceded the ordinance. In other words, because the City Council indicated mild disapproval of the group known as "hippies" by referring to them, *outside the ordinance,* as unsanitary and undesirable, four of seven Justices held that the ordinance itself was void although apparently neutral. The Court appears to concede that the park was, in fact, being destroyed by hippies:

> "In the instant case, the City Council declared that Carmel's parks and beaches were in many cases, rendered unfit for normal public use, and that unless the ordinance in question were adopted, the use and enjoyment of public property will be jeopardized if not entirely eliminated. According to the city, the park in question was designed only to accommodate small groups of people, but that due to the influx of 'hippies', the mass of humanity that occupied the park smothered the grass by their very numbers. For purposes of discussion, we must presume the foregoing facts to be true; indeed, the majority apparently concede that point. Accordingly, that portion of the ordinance which prohibits persons from lying or sitting on park lawns is clearly a reasonable and proper means of protecting the

grass." Dissent, by Justice Burke, *Parr v. Municipal Court,* 3 Cal.3d 861, at p. 871.

The question then presents itself: If there is evidence of mild hostility towards a destructive or disorderly class or group, should an otherwise necessary and neutral ordinance directed at a wrong being committed by the group, be declared unconstitutional as discriminatory? This Court has apparently not reached this issue, although it has decided that an improper motive will not render void an otherwise valid law. *U.S. v. O'Brien,* 391 U.S. 367, 383-384. In the instant case the motive was proper—protection of the park—but there was evidence of aversion towards the class known as hippies that was destroying the park. Thus, the motive appears to be proper, the law appears to be necessary, but the bare majority of California Supreme Court have concluded that disapproval of hippies in a statement independent of the ordinance renders it void.

The danger in the decision is this: It is easy to provide evidence of hostility towards a class or group at a point in time when certain laws are passed—laws that are necessary and neutral. Yet this evidence of hostility will destroy the regulations. If the California decision is allowed to stand, it could invalidate many important and necessary local laws. Indeed, crucial state statutes could be declared void.

Consider this hypothetical case: The Berkeley, California, City Council passes an ordinance making it unlawful for any person to pass a magnet over com-

puter tapes with the intent to erase and destroy the information contained therein. At the same time, the City Council justifies the ordinance by saying that "the Weathermen, a criminal and irrational faction of the S.D.S., has embarked on a campaign to destroy all magnetic computer tapes by the surreptitious use of magnets, as a protest against capitalism."

Under the rationale of the opinion majority of the California Supreme Court, the Berkeley City ordinance would have to be declared void. The City Council was obviously hostile to the group at which the ordinance was directed: the Weathermen. In addition, the particular class would be the only group affected. Because the City Council does not like Weathermen, the ordinance is unconstitutional. The following language from the California decision condemning the Carmel ordinance would compel that result:

> "This rationale evolves: hippies have been the cause of the destruction of communities which permitted their presence in large numbers; Carmel had become a meeting place, a mecca, for disenchanted hippies; too many hippies were lounging in the City's central park. Throughout its plea the City makes clear that Carmel perceives hippies, and only hippies, as the threat to public property. To avoid the destruction that assertedly befell Haight-Ashbury and Berkeley at the hands of the hippies, Carmel was compelled to legislate against them—to prohibit their lying or sitting in the park and at the other public places where they choose to congregate." *Parr v. Municipal Court,* 3 Cal. 3d 861, at pp. 867-868.

In the case at bar the hippies were destroying the park; in the hypothetical case, the Weathermen were destroying computer tapes.

Petitioner is informed and believes and accordingly states herein, that the rationale of the California decision is presently being used to defeat a Palm Springs trespass ordinance restricting hippies (and all others) in a canyon adjacent to the City; the attorney for the hippies argues that there is considerable evidence of hostility toward hippies in Palm Springs; therefore, the ordinance is invalid regardless of its necessity or neutrality.

It is submitted that considerable evidence could be presented in any resort community that there is disapproval of hippies. Does that mean that no ordinances can be adopted that affect all persons including hippies? If the hippies developed a social conscience and began spray-painting slogans on public walls, could not the City prohibit all persons from spray-painting the walls? Under the California decision before this Court, Carmel cannot stop them.

By the same token, there is ample evidence of general public hostility towards Black Panthers, communists and John Birchers. Under the California decision Black Panthers, communists and John Birchers may be granted immunity from prosecution for violation of laws passed to control illegal activity by all persons; laws that apply to all equally, but were prompted by the offensive conduct of a class or group.

It is submitted that the above arguments are sufficient to grant the Writ of Certiorari.

II

AN EXPRESSION OF MILD DISAPPROVAL DIRECTED TOWARD A CLASS OR GROUP, SUCH AS HIPPIES, BY A LEGISLATIVE BODY, SHOULD NOT CREATE A PRESUMPTION THAT A NEUTRAL ORDINANCE WILL BE ARBITRARILY AND DISCRIMINATELY ENFORCED BY POLICE OFFICIALS SOLELY AGAINST THAT GROUP.

The majority of the California Supreme Court, without any evidence whatsoever in support of its conclusion, ruled that a statement of mild disapproval directed toward hippies by the Carmel City Council would compel arbitrary and discriminatory enforcement of the ordinance only against hippies, even though the ordinance was directed against all persons.

> "In construing the Carmel ordinance, we may not overlook its probable impact. Although the operative subsections prohibit all persons from sitting on the grass and misusing public property, *Carmel's police officers and prosecutor are unlikely to ignore the council's clear expression of legislative purpose in the Declaration of Urgency. Those officials responsible for the enforcement of the law are put on notice that the public property in the city is in imminent danger because of the influx of a particular class against which the ordinance is unmistakably directed. The inevitable effect must be discriminatory enforcement consistent with the discriminatory purpose expressed by the council:* the police will direct their efforts to the task of ridding Carmel's

public property of the menace of the hippies, and the public prosecutor will use his discretion to most effectively attack the source of the problem described by the City Council." *Parr v. Municipal Court,* 3 Cal. 3d 861, at p. 868. (Emphasis added.)

Police officials are under attack by many segments of society; an unwarranted attack, contrary to all existing presumptions, by the California Supreme Court, may have an extraordinary impact on the effectiveness of police activities. Probably no other high state court, without evidence, has made such an openly cynical and hostile attack on police officers as this:

"In the ordinance before us the undesirability of hippies was expressly recognized by the legislative body in terms which could hardly be ignored by the police. In revealing its own predilections by means of legislative language, *the Council mandated discriminatory enforcement by law enforcement agencies." Parr v. Municipal Court,* 3 Cal. 3d 861; at p. 869. (Emphasis added.)

The California decision says, in effect, that police are governed by public opinion rather than the law. In other words, if there is evidence that the City Council is opposed to a certain class or group, police officers will ignore the law and arbitrarily harass and intimidate that group. This shows an extraordinary lack of confidence in police officials. Police are entitled to, if not a presumption in their favor, at least equal footing with the people they must control.

Until this decision, the law in California was clear that the good faith of those enforcing the law and the validity of their action was presumed, and the burden of proving discrimination was upon the complaining party. *City of Banning v. Desert Outdoor Advertising, Inc.,* 209 Cal. App. 2d 152. In the case at bar there was no evidence whatsoever of discriminatory enforcement; on the contrary, respondent is a resident merchant of the City.

It seems unfair to presume that police will violate the 14th Amendment by discriminating against people merely because the group involved is held in disfavor by the legislative body. This point alone should justify granting the writ prayed for in this petition.

III

A CITY SHOULD NOT BE FOREVER PROHIBITED FROM LEGISLATING IN AN AREA THAT AFFECTS A CLASS OR A GROUP, AS WELL AS ALL OTHERS MERELY BECAUSE THE LEGISLATIVE BODY HOLDS THE CLASS OR GROUP IN DISFAVOR.

The California Supreme Court in the case under consideration holds that the "obvious hostility" toward hippies shown by the Urgency Declaration invalidates the entire ordinance regulating conduct on public property, even though the ordinance itself is neutral.

What, then, is the City to do regarding regulation of conduct on public property? Having once estab-

lished that we disapprove of hippies who were detroying our park, are we forever prohibited from legislating in the field of regulation of conduct on public property? Can we ever pass an ordinance that prohibits littering?

The dissent suggests that Carmel's only possible approach is to re-enact the same ordinance without an accompanying statement that mentioned hippies. *Parr v. Municipal Court,* 3 Cal. 3d 861, at 873. Could the majority of the California Supreme Court be so easily persuaded into thinking we no longer disapprove of hippies? It seems unlikely. Would they approve an identical ordinance after having decided that it was the City's intention by the original ordinance to "irritate youthful hippies and to make their existence in Carmel as uncomfortable as possible by closing to them effective use of those public places where they choose to congregate"? *Parr v. Municipal Court,* 3 Cal. 3d 861, at p. 868. Again, unlikely.

The City of Carmel candidly admitted what everyone already knows about Carmel and all other cities like it: it realistically disapproves of hippies. No one would say that Aspen, Palm Springs or Miami approved of hippies, or were even neutral toward them. Must these City Councils wear "blinders" in order to be assured of the constitutionality of any urgent ordinance? What then becomes of our representative form of government? The interests of the many can't be protected from the onslaught of the few. If hippies created a litter problem in Aspen, couldn't the Aspen council, although opposed to hippies, pass an ordinance

prohibiting all persons from littering? Perhaps in Colorado. Apparently not in California.

If the City of Carmel is denied the right to legislate in an area of crucial importance and in an area in which all other cities may legislate, the City of Carmel, itself, is denied the equal protection of the laws guaranteed by the 14th Amendment of the United States Constitution.

CONCLUSION

This Court should grant certiorari and the judgment below should be reversed.

Dated, Carmel, California,
March 25, 1971.

Respectfully submitted,

WILLIAM B. BURLEIGH,
City Attorney for City of Carmel-by-the-Sea,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

In the Supreme Court of the State of California

S.F. No. 22,748

ANN KESSINGER PARR,
Plaintiff and Appellant,
vs.
THE MUNICIPAL COURT OF THE MONTEREY-CARMEL JUDICIAL DISTRICT, MONTEREY COUNTY,
Defendant and Respondent,
THE PEOPLE OF THE STATE OF CALIFORNIA, by their attorney, William B. Burleigh, City Attorney for the City of CARMEL-BY-THE-SEA,
Real Party in Interest.

OPINION
(as modified January 27, 1971)

On July 31, 1968, the City Council of Carmel-by-the-Sea (Carmel) adopted ordinance 697.02 regulating the use of public property. Section (2)(b) of the ordinance declares: "On any public property it shall be unlawful for any person to: . . . [(2)(b)] Climb any tree; or walk, stand or sit upon mouments, vases, fountains, railings, fences, planted areas, or upon

any other property not designed or customarily used for such purposes, or to sit on any sidewalks or steps, or to lie or sit on any lawns." In addition, the ordinance prohibits disfiguration or removal of public property, misuse of public washrooms, removal of natural resources, construction of any structures on public property without a permit, destruction or removal of any trees or shrubbery on public property, littering of public property, loitering and boisterousness on public property, and vending or advertising on public property without a permit.

The ordinance was accompanied by a "Declaration of Urgency" designed to render it effective immediately.[1] The declaration provides: "This is an urgency ordinance adopted to preserve the public peace and safety pursuant to Government Code Section 36937, and shall take effect immediately; The City Council of Carmel-by-the-Sea has observed an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as 'hippies,' and finds that unless proper regulations are adopted immediately the use and enjoyment of public property will be jeopardized if not entirely eliminated; the public parks and beaches are, in many cases, rendered unfit for normal public use by the unregulated and uncontrolled conduct of the new transients."

---

[1]California Government Code section 36937 provides in part as follows: "Ordinances take effect 30 days after their final passage. An ordinance takes effect immediately, if it is an ordinance: . . . (b) For the immediate preservation of the public peace, health or safety, containing a declaration of the facts constituting the urgency, and is passed by a four-fifths vote of the city council."

On Sunday, August 18, 1968, Ann Parr, a local merchant, was arrested while sitting on the grass in Devendorf Plaza, a public park in the City of Carmel. She was charged with a violation of section 697.02, subdivision (2)(b), of the Municipal Code—unlawful sitting on a public lawn. Mrs. Parr's arrest took place at the city park during her participation in a public assembly called to discuss the new ordinance.

Having unsuccessfully demurred to the criminal complaint filed against her in municipal court, Mrs. Parr next sought a writ of prohibition from the superior court to restrain the lower court from proceeding with the trial. After hearing on November 1, her petition for a peremptory writ was denied, and she appeals.

Petitioner contends that section 697.02, subdivision (2)(b), is void on its face because it is unconstitutional class legislation which violates the equal protection clause of the Fourteenth Amendment.[2] She asserts that the purpose and effect of the challenged section is to discriminate against "hippies" as a group because of their status and to drive them out of the city.

The traditional focus of the equal protection clause has been the relationship between the classifications

[2]Petitioner also makes several other contentions, i.e., that the ordinance is an unconstitutionally overbroad invasion of the rights of free speech and peaceable assembly, that the challenged ordinance is unconstitutionally uncertain, that the field governed by the ordinance has been preempted by state law, and that the ordinance was not effective on the date of the arrest because it was not properly adopted as an urgency ordinance. Because we conclude that the ordinance violates the equal protection clause, these additional contentions do not require discussion.

drawn by a statute and the purpose of the statute. (1) A statutory classification which does not bear a rational relationship to the purpose which the statute is intended to serve violates the equal protection clause. But there is an additional dimension to equal protection which requires that statutory classifications be related to *permissible* purposes. The Supreme Court "has gone beyond the use of the equal protection clause as a classification requirement. It has interpreted the clause as a ban against 'discriminatory' legislation, and thus has become involved in the criticism of legislative purpose. . . . Laws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals. . . . When and if the proscribed motives [of hostility and prejudice] replace a concern for the public good as the 'purpose' of the law, there is a violation of the equal protection prohibition against discriminatory legislation." (Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws* (1949) 37 Cal.L.Rev. 341, 357, 358-359.)

Thus, in *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533-534 [50 Cal. Rptr. 881, 413 P.2d 825], affd. *Reitman v. Mulkey* (1967) 387 U.S. 369 [18 L.Ed.2d 830, 87 S.Ct. 1627], we declared: "A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective [citations] and for its ultimate effect [citations]." We proceeded to analyze the circumstances surrounding the enactment of the initiative known as Proposition 14 and concluded it was designed "with the clear intent

to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right." (64 Cal.2d at pp. 534-535.) And in *Truax v. Raich* (1915) 239 U.S. 33 [60 L.Ed. 131, 36 S.Ct. 7], the United States Supreme Court invalidated an Arizona initiative measure requiring employers of five or more persons to hire 80 percent native-born citizens or qualified electors. The classification drawn by the state between aliens and native-born citizens was, without doubt, rationally related to the purpose of the statute, which was to reduce the competition by aliens in the Arizona employment market. Nevertheless, the court struck down the statute: "[T]he purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as 'An act to protect the citizens of the United States in their employment against noncitizens of the United States, in Arizona.' As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the business described. . . . [W]e are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien." (*Id.* at pp. 40-41 [60 L.Ed. at p. 135].)

As the Supreme Court looked to the title in *Truax*, we need not go far afield to determine the purpose sought to be achieved by ordinance 697.02. The legislative intent is indelibly expressed in the urgency

clause which by definition must state relevant and persuasive facts necessitating the legislative action. The Carmel City Council apparently believed that the city's public property was in imminent danger of ruin due to "an extraordinary influx of undesirable and unsanitary visitors to the city, sometimes known as 'hippies'. . . ." The council's rhetoric thus singles out hippies as a social group consisting of unsanitary transients whose presence in Carmel is deemed to be undesirable. It would appear to follow that the operative sections of the statute are intended to be limited to hippies in their application, since hippies are the only identified source of the danger to Carmel's public property and have been officially declared an unsanitary and undesirable group. The irrefragable implication is that the Carmel City Council sought, through Municipal Code section 697.02, to rid the city of the blight it perceived to be created by the presence of the hippies.

The People urge us to ignore the language in the Declaration of Urgency and to look exclusively to the operative language of the ordinance. They emphasize that the ordinance is neutral on its face—that it prohibits all persons from sitting on public lawns, not just hippies. The purpose of the ordinance, they contend, is the permissible desire to prevent destruction of the park due to excessive sitting and lying on the grass.

But we may not blind ourselves to official pronouncements of a hostile and discriminatory purpose solely because the ordinance employs facially neutral

language. As early as 1879, in a milieu not celebrated for toleration of minorities, one of California's most distinguished jurists struck down legislation neutral on its face when he pierced the veil to disclose its subtle discriminatory purpose. In *Ho Ah Kow v. Nunan* (D.Cal. 1879) 12 Fed. Cas. 252 [5 Sawy 552], Justice Stephen J. Field invalidated a San Francisco ordinance requiring that every male entering the county jail have his hair cut to a uniform length of one inch.[3] Under the ordinance, a Chinese, convicted of a misdemeanor violation of a health statute prohibiting persons from sleeping in overcrowded quarters, was subjected to the loss of his traditional queue. The basis of Justice Field's ruling was his analysis of the ordinance as class legislation designed to punish the racially unpopular Chinese. "The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with

[3]This case was decided by Justice Field while handling his circuit duties in California. Field, the fifth Chief Justice of this court, had been appointed to the United States Supreme Court in 1863 by President Abraham Lincoln. A commentator has written that he "had greater effect on California history and legal institutions than any other man. . . ." (Supreme Court Justices of Cal. (J. Johnson ed. 1963) see Prince, p. 65, Stephen J. Field.)

blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. . . .

"Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them. We have, for instance, in our community a large number of Jews. . . . Now, if they should in some quarter of the city overcrowd their dwellings and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping apartments, an ordinance of the supervisors requiring that all prisoners confined in the county jail should be fed on pork would be seen by every one to be leveled at them; and, notwithstanding its general terms, would be regarded as a special law in its purpose and operation. . . .

"[I]n our country hostile and discriminatory legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution." (*Id.* at pp. 255, 256.)

More recently, in *Hall v. St. Helena Parish School Board* (E.D. La. 1961) 197 F.Supp. 649, affd. per

curiam (1962) 368 U.S. 515 [7 L.Ed. 521, 82 S.Ct. 529], a federal district court looked through neutral language and uncovered a discriminatory purpose in a Louisiana state law giving local municipalities the option to operate public or private schools. "Irrespective of the express terms of a statute, particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect. 'A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act.' *Miller v. City of Milwaukee,* 272 U.S. 713, 715. . . . Moreover, 'acts generally lawful may become unlawful when done to accomplish an unlawful end.' [Citation.] The defendants argue that we should not probe for the purpose of this legislation, that we should ignore the events which led up to and accompanied its passage, and determine its validity based on its language. But '. . . . we cannot shut our eyes to matters of public notoriety and general cognizance. . . .' The sponsors of this legislation, in their public statements, if not in the Act itself, have spelled out its real purpose." (197 F.Supp. at p. 652.) (Fns. omitted.) (See also *Oyama v. California* (1948) 332 U.S. 633, 650-651, 657 [92 L.Ed. 249, 261-262, 264, 68 S.Ct. 269], Justice Murphy concurring; *Perez v. Sharp* (1948) 32 Cal.2d 711, 736 [198 P.2d 17], Justice Carter concurring.)

Compared to more sophisticated statutes, subtly concealing their actual motivation, the enactment before us possesses the virtue of candor and thus makes

our task relatively uncomplicated. We need not look beyond the adopted language of this ordinance to discover its hostile raison d'etre. The description of "undesirable" and "unsanitary" persons referred to as "transients" may not be squared with the claimed neutral purpose of preventing all persons from sitting or lying on the grass in order to protect it from undue wear.[4] But if any doubt remains as to the city council's objective, we need refer only to the explanation of the city's legal spokesman, the city attorney, in the People's brief filed with this court: "Carmel also urges the court to examine the 'historical context and the conditions existing prior to' enactment of the ordinance. We hope the court will not shut its eyes to 'matters of public notoriety and general cognizance.' We hope the court has seen the instant slum created in the Haight-Ashbury. We hope the court has seen the deterioration if not destruction of the Telegraph-campus in Berkeley; we hope the court has seen the squalor and filth of the communes in Big Sur, and the damage caused by the sheer numbers of this transient phenomenon. The court may be aware that Carmel had become a meeting place—a mecca—for the hippies who had become disenchanted with the Haight-Ashbury and Berkeley. Regarding this ordinance we hope that the court observed the 'conditions existing prior to its enactment.' The mass of humanity that occupied the park smothered the grass by their

[4]It is significant that the legislative scheme purportedly designed to protect the city park prohibits only lying or sitting on the grass, but does not ban standing, running, playing, or gamboling by persons, singly or in great numbers, on the same grass.

very numbers. The grass competed with and struggled against the overwhelming effect of heavy usage—cigarettes, bottles, knives, and just plain people."

The discriminatory antagonism is unmistakable in the city's description of the problem which purportedly necessitated ordinance 697.02. This rationale evolves: hippies have been the cause of the destruction of the communities which permitted their presence in large numbers; Carmel had become a meeting place, a mecca, for disenchanted hippies; too many hippies were lounging in the city's central park. Throughout its plea the city makes clear that Carmel perceives hippies, and only hippies, as the threat to public property. To avoid the destruction that assertedly befell Haight-Ashbury and Berkeley at the hands of the hippies, Carmel was compelled to legislate against them—to prohibit their lying or sitting in the park and at the other public places where they choose to congregate.

We recall Justice Murphy's description of the discriminatory goal of California's Alien Land Law: "The more basic purpose of the statute was to irritate the Japanese, to make economic life in California as uncomfortable and unprofitable for them as legally possible. It was thus but a step in the long campaign to discourage the Japanese from entering California and to drive out those who were already there." (*Oyama v. California* (1948) *supra,* 332 U.S. 633, 657 [92 L.Ed. 249, 264], Justice Murphy concurring.) In the instant case, it appears that the purpose of section 697.02 is to irritate youthful hippies and to make their

existence in Carmel as uncomfortable as possible by closing to them effective use of those public places where they choose to congregate.

We conclude that the discriminatory purpose underlying ordinance 697.02 invalidates the measure. That would be so even if the section did not have a predictable discriminatory impact. By using official Municipal Code language to single out a social group and stigmatize its members as "undesirable" and "unsanitary," the city council violated the constitutional guaranty of the equal protection of the laws. The Carmel City Council made no effort to define the term "hippie," so as to limit the application of its hostile rhetoric to persons who are engaged in illegal conduct. Rather, the council makes pejorative reference to the entire class of youthful Carmel visitors whose mode of dress and life style differ from and irritate the majority of the residents and tourists in the city.

In construing the Carmel ordinance, we may not overlook its probable impact. Although the operative subsections prohibit all persons from sitting on the grass and misusing public property, Carmel's police officers and prosecutor are unlikely to ignore the council's clear expression of legislative purpose in the Declaration of Urgency. Those officials responsible for the enforcement of the law are put on notice that the public property in the city is in imminent danger because of the influx of a particular class against which the ordinance is unmistakably directed. The inevitable effect must be discriminatory enforcement consistent with the discriminatory purpose expressed

by the council: the police will direct their efforts to the task of ridding Carmel's public property of the menace of the hippies, and the public prosecutor will use his discretion to most effectively attack the source of the problem described by the city council.

In *Wheeler v. Goodman* (W.D. N.C. 1969) 306 F. Supp. 58, the federal court invalidated a vague and overbroad vagrancy statute which, while phrased to apply to vagrants generally, was being used to harass a group of resident hippies. The court cogently analyzed the probable motivation of the police in applying the vagrancy statute against the hippies: "Here plaintiffs' real offense (to the police) consisted of their being hippies. . . . It was enough to initiate oppressive police action that plaintiffs seemed 'vaguely undesirable'. . . ." (*Id.* at p. 62.) In the ordinance before us the undesirability of hippies was expressly recognized by the legislative body in terms which could hardly be ignored by the police. In revealing its own predilections by means of legislative language, the council mandated discriminatory enforcement by law enforcement agencies.

The People assert that the arrest of Mrs. Parr, a merchant beyond the bloom of youth, demonstrates the impartial operation of the ordinance. Because Mrs. Parr is not a hippie, we are told we need have no apprehension that police will direct their enforcement efforts against the group singled out by the legislative body. But we cannot overlook the countervailing fact that Mrs. Parr, though a resident and a merchant, was also a participant in a public meeting

called to object to section 697.02; indeed, her conduct of sitting on the grass in violation of the ordinance was an intentional act of protest. Therefore, Mrs. Parr was associated with the species of allegedly unsanitary and undesirable transients condemned by the council, although her age, occupation, and appearance theoretically might have suggested her exclusion. Furthermore, a single and perhaps calculated incident of impartial application of an ordinance which by its preamble virtually commands discriminatory enforcement does not suffice to validate the ordinance.

In assessing the probable impact of section 697.02, we are mindful of the private discrimination against hippies which the ordinance will likely foster. In *Lombard v. Louisiana* (1963) 373 U.S. 267 [10 L.Ed. 2d 338, 83 S.Ct. 1122], the United States Supreme Court reversed trespass convictions rendered against black youths sitting-in at segregated lunch counters on the ground that the private racial discrimination at the counters was coerced by published comments of city officials condemning the sit-ins. "As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. . . . The official command here was to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance. . . . Therefore, . . . these convictions, commanded as they were by the voice of the State directing segregated service at the restaurant, cannot stand." (*Id.* at pp. 273-274 [10 L.Ed.2d at pp. 342-343].) Thus, the court viewed

the impact of the public statements of the mayor and the superintendent of police as equivalent to an ordinance establishing segregated restaurant service and concluded that the private restaurant owners were coerced by those authoritative declarations to maintain an exclusionary policy.

In the case at bar, the City Council of Carmel, in official language accompanying a city ordinance, branded hippies as an undesirable group of transients whose presence threatened the well-being of the city. As in *Lombard,* public spirited citizens are likely to read the ordinance adopted by their duly constituted governing body as a mandate for perfervid private efforts calculated to deny other services to the "offenders." If the presence of hippies in Carmel is to be discouraged, as the ordinance implies, residents of the city may perceive it to be their civic duty to cooperate in the campaign.

Constitutional questions are not determined by a consensus of current public opinion. (*Muller v. Oregon* (1908) 208 U.S. 412, 420 [52 L.Ed. 551, 555, 28 S.Ct. 324].) We are reminded of our decision in *Mulkey v. Reitman* (1966) *supra,* 64 Cal.2d 529, affirmed *Reitman v. Mulkey* (1967) 387 U.S. 369, in which we held that Proposition 14 denied equal protection to blacks because that initiative measure was passed under circumstances constituting state encouragement of private racial discrimination. Neither we nor the United States Supreme Court were misled by phraseology of the initiative measure suggesting neutral recognition of the principle of free choice. In the

instant case, we are faced with a less subtle legislative effort to encourage private discrimination against the members of a cultural minority whose life style is disturbing to the majority. Here, the appearance of neutrality is derived from the general language of the operative subsections, but the discriminatory impact is achieved by the hostile tone and the critical descriptions directed to one segment of society in the accompanying urgency clause.

Since constitutional verities are most frequently at the core of issues of monumental dimension, a certain insouciance is understandable when the City of Carmel undertakes what to some may seem the comparatively insignificant act of preventing nonresident hippies from sitting in its park. But we cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color.

We hold ordinance 697.02 to be in violation of the equal protection clause of the Fourteenth Amendment.

The order is reversed with directions to the superior court to issue the peremptory writ of prohibition as prayed.

Mosk, J.

Peters, J., Tobriner, J., and Sullivan, J., concurred.

Dissenting Opinion

I dissent. The ordinance in question constituted a proper exercise of the police power aimed at preserving and protecting Carmel's parks and other public property from injury and destruction. That ordinance, applicable to residents and transients alike, should not be rendered nugatory and unenforceable merely because the city council maligned certain members of society in explaining the reasons which justified giving the ordinance immediate effect.

First of all, the majority do not purport to challenge Carmel's power to enact an ordinance regulating the use of its parks and other public property. Indeed, it is well settled that such ordinances are valid "to the extent necessary to prevent interference with the municipality's interest in protecting the public health, safety, or order or in assuring the efficient and orderly use of streets and parks for their primary purposes." (*In re Hoffman,* 67 Cal.2d 845, 849 [64 Cal.Rptr. 97, 434 P.2d 353], and cases cited; see *In re Cox,* 3 Cal. 3d 205, 218-220 [90 Cal.Rptr. 24, 474 P.2d 992]; *Walker v. City of Birmingham,* 388 U.S. 307, 315 [18 L.Ed.2d 1210, 1216, 87 S.Ct. 1824]; *Poulos v. New Hampshire,* 345 U.S. 395, 405 [97 L.Ed. 1105, 1113, 73 S.Ct. 760, 30 A.L.R.2d 987]; *Kunz v. New York,* 340 U.S. 290, 293-294 [95 L.Ed. 280, 283-284, 71 S.Ct. 312]; *Cox v. New Hampshire,* 312 U.S. 569, 574 [85 L.Ed. 1049, 1052, 61 S.Ct. 762, 133 A.L.R. 1396].) Accordingly, our state constitution and statutes expressly permit municipal bodies to enact ordinances regulating conduct affecting public parks and other

public property. (See Cal. Const., art. XI, § 11; Pen. Code, § 647, subd. (c); Pub. Res. Code, § 5193.)

In the instant case, the city council declared that Carmel's parks and beaches were "in many cases, rendered unfit for normal public use," and that unless the ordinance in question were adopted, "the use and enjoyment of public property will be jeopardized if not entirely eliminated." According to the city, the park in question was designed to accommodate only small groups of people, but that due to the influx of "hippies," "the mass of humanity that occupied the park smothered the grass by their very numbers." For purposes of discussion, we must presume the foregoing facts to be true; indeed, the majority apparently concede that point. Accordingly, that portion of the ordinance which prohibits persons from lying or sitting on park lawns is clearly a reasonable and proper means of protecting the grass.[1]

Nevertheless, the majority conclude that the ordinance is void "on its face," solely by reason of the assertedly "hostile raison d'etre" disclosed in the declaration of urgency which accompanies the ordinance. According to the majority, we are entitled to assume solely from the hostile tone of the declaration, and contrary to the words of the ordinance itself, that

---

[1]The majority suggest (fn. 4) that it is significant that the ordinance does not prohibit standing or running on the grass. However, the city council could legitimately conclude that the greater danger of suffocating the grass would be from persons lying or sitting thereon. " 'The Legislature . . . is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident.' " (*In re Ricky H.*, 2 Cal.3d 513, 521 522 [86 Cal.Rptr. 76, 468 P.2d 204], quoting an earlier case.)

"the operative sections of the statute are intended to be limited to hippies in their application." As we shall see, this doubtful premise runs counter to every rule and presumption applicable to judicial review of statutes or ordinances, and has the unfortunate effect of sanctioning continued acts of damage and destruction to Carmel's parks and property.

Initially, it is clear that in ascertaining the constitutionality of legislation, the courts should not attempt to determine the motives which led to its enactment, for even an improper motive will not render void an otherwise valid law. (*United States v. O'Brien,* 391 U.S. 367, 383-384 [20 L.Ed.2d 672, 683-684, 88 S.Ct. 1673]; *Serve Yourself Gas etc. Assn. v. Brock,* 39 Cal. 2d 813, 819 [249 P.2d 545]; *In re Sumida,* 177 Cal. 388, 390 [170 P. 823].) This point was made in the article upon which the majority rely, wherein the authors state that "the consideration of motive is complicated by the fact that it is altogether possible for a law which is the expression of a forbidden motive *to be a good law.* What is to be done with a law which, passed with the most questionable of motives, still makes a positive contribution to the public good? Suppose the Legislature decides to 'get' Standard Oil, or Lovett, or Petrillo, but does so through a law which hits all monopolies, all government employees, or all labor unions." (Italics added; Tussman and tenBroek, The Equal Protection of the Laws (1949) 37 Cal.L.Rev. 341, 360.) In the instant case, even if we assume that Carmel's ordinance was enacted to "get" hippies (or at least to get them off

the grass), that ordinance by its terms applies to "any person" violating its provisions. In spite of its assertedly improper motives, it is a "good law," in the words of Messrs. Tussman and tenBroek.

Of course, the foregoing rule does not prevent the courts from examining the immediate objectives and ultimate effect of legislation for purposes of determining its validity, and laws which have a clear discriminatory purpose and effect will be held invalid as a denial of equal protection. (See, e.g., *Mulkey v. Reitman,* 64 Cal.2d 529, 533-536 [50 Cal.Rptr. 881, 413 P. 2d 825], affd. sub nom. *Reitman v. Mulkey,* 387 U.S. 369 [18 L.Ed.2d 830, 87 S.Ct. 1627], and *Truax v. Raich,* 239 U.S. 33 [60 L.Ed. 131, 36 S.Ct. 7], cited by the majority.) A statute which is seemingly valid on its face may violate equal protection principles if applied or enforced in a discriminatory manner. (*Brock v. Superior Court,* 12 Cal.2d 605, 610 [86 P. 2d 805]; *City of Banning v. Desert Outdoor Advertising, Inc.,* 209 Cal.App.2d 152, 154 [25 Cal.Rptr. 621].) However, "A discriminatory intent or purpose is not presumed. [Citations.] To the contrary, the good faith of those enforcing the law and the validity of their action in the premises are presumed. [Citation.] The burden of proving discrimination is upon the complaining party. [Citation.]" (*City of Banning, supra,* p. 155; see 11 Cal.Jur.2d Constitutional Law, §§ 74-79, and cases cited.)

The majority would ignore the foregoing rules and presumptions, and would presume instead that the city officials and law enforcement officers have restricted or

will restrict the applicability of the ordinance to hippies only. However, that premise is not even remotely supported by the declaration of urgency upon which the majority rely. The declaration simply recites the *facts* which induced city to conclude that the ordinance should take immediate effect, namely, that city had become inundated by persons (i.e., "hippies") who were destroying public property. Government Code section 36937 required the city to state "the facts constituting the urgency" in order to permit the ordinance to take immediate effect. The city council complied with that section, stated the facts, and enacted an ordinance which applies to, and is enforceable against, *any person* who violates its provisions. Neither the city council, the city itself, nor its inhabitants, should be penalized and their ordinance rendered totally void merely because the declaration harmlessly, though perhaps unfairly, characterized as "undesirable" and "unsanitary" those persons who, by their conduct, created the urgent situation which the ordinance was designed to correct. In the absence of any evidence whatsoever that Carmel's ordinance has been unevenly applied against them, and in the face of a presumption to the contrary, it seems apparent that the majority's holding is totally unfounded.

Of course, the unfortunate result of this rash holding is to invalidate, *in its entirety,* comprehensive and urgently needed legislation aimed at preserving one of California's most attractive communities. Although the majority do not so state, it seems implicit in their

contention that Carmel ultimately may undo the taint created by its declaration of urgency by repealing the ordinance and declaration, and thereafter enacting identical legislation in its place, without derogatory references to the youthful visitors of whom the majority appear to be so solicitous. To rule otherwise would be unthinkable, for we would tie Carmel's hands indefinitely and prevent the city from ever protecting its parks and property from an assault which, giving city's declaration the credence it deserves, is imminent, continuing and devastating. Thus the ultimate effect of the majority's holding in this case will be to require the City of Carmel to repeal, and thereupon to re-enact, the same ordinance. In my view, the Constitution does not require such an unproductive result.

Burke, J.

Wright, C. J., and McComb, J., concurred.

Filed January 18, 1971,
Gale Bishel, Clerk.

Appendix B

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 26,594

ANN KESSINGER PARR,
Plaintiff and Appellant,

vs.

THE MUNICIPAL COURT OF THE MONTEREY-CARMEL JUDICIAL DISTRICT, MONTEREY COUNTY,
Defendant and Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA, by their attorney, William B. Burleigh, City Attorney for the City of CARMEL-BY-THE-SEA,
Real Party in Interest.

OPINION

Appellant was charged in municipal court with violation of a city ordinance prohibiting sitting upon the grass of a public park. When her demurrer to the complaint was overruled, she petitioned in superior court for a writ of prohibition. The writ was denied after hearing. She appeals.

The portion of the ordinance here relevant is: "On any public property, it shall be unlawful for any person to . . . lie or sit on any lawns." Appellant sat on the lawn while attending a meeting in the park at which protests against the adoption of this ordinance were being advanced by a number of speakers.

Appellant argues that the ordinance necessarily denies equal protection of the law. Part of the argument is that, on its face, the ordinance applies to all lawns, public or private, but obviously is not intended to be applied to privately owned lawns. This argument, of course, is based upon a selectively myopic reading of the ordinance. In fact, the ordinance applies only to "public property".

She also argues that equal protection is denied because the ordinance in fact is to be applied only against a limited class—non-resident "hippies". This argument turns in part upon the declaration of urgency accompanying the ordinance, which will be discussed later. Save for inferences from that declaration, there is no evidence to support this view. At oral argument, appellant's counsel readily conceded that his client is a resident and a merchant in Carmel, and not a "hippie" by any definition. Thus this prosecution itself negates the claim of enforcement against a limited group only.

On its face, the ordinance applies equally to all who commit the prohibited acts. The acquisition and maintenance of public parks is a long recognized municipal function (10 McQuillin on Municipal Corporations, § 28.54). The city council has determined these measures for park protection to be for the pro-

tection of the public health, safety and welfare. Determination of the wisdom and reasonableness of an exercise of the police power is for the legislative body, and will not be disturbed by the courts if the issue is debatable (*Lockard v. City of Los Angeles,* 33 Cal.2d 453, 461 [202 P.2d 38, 7 A.L.R.2d 990]). The courts accord good faith to the city in the absence of a clear showing to the contrary (*Hadacheck v. Sebastian,* 239 U.S. 394, 414 [60 L.Ed. 348, 358, 36 S.Ct. 143]). Here there is no showing of arbitrary or discriminatory design in enforcement.

The contention that the ordinance is vague and uncertain borders on the frivolous. It is difficult to see how the act of lying or sitting on a park lawn can be more specifically stated. The same is true of other prohibitions in the ordinance. There simply is no uncertainty in the language.

Appellant argues that the ordinance is unconstitutional because it invades the First Amendment rights of free speech and peaceable assembly. We recognize that a regulation of First Amendment rights must be "supported by a valid municipal interest that cannot be protected by different or more narrow means" (*In re Hoffman,* 67 Cal.2d 845, 849 [64 Cal.Rptr. 97, 434 P.2d 353], and cases there cited). This case, however, is readily distinguishable from *Hoffman.* The ordinance before us does not prohibit mere presence (*Hoffman,* p. 848). Standing or walking in a park, whether as demonstrator or otherwise, is not barred. It is only particular uses or activities, e.g., sitting or lying on the grass, which are proscribed. Unlike *Hoffman,* there is no assertion that the ordinance was

enforced in such a way as to restrict either speech or assembly. Rather, the only arrest alleged is that of defendant. No speaker is claimed to have been arrested. There is no suggestion that the arrest of defendant was either designed to or did break up the protest meeting. On the record here no curbing of First Amendment rights is shown. None appears on the face of the ordinance.

We find no merit in appellant's contention that this is a trespass ordinance, and that the field of trespass upon public parks has been pre-empted by state legislation. As pointed out earlier, the ordinance seeks to regulate activity and not mere presence. Moreover, the only state legislation in this field, Penal Code section 647c, specifically reserves to the cities the power "to regulate conduct upon a street, sidewalk, or other public place."

Finally, appellant challenges the validity of the declaration of urgency accompanying this ordinance. The charged violation occurred less than 30 days after adoption of the ordinance. Hence the ordinance was effective at the arrest date only if the declaration of urgency, which would make it effective upon adoption, were valid (Gov. Code, § 36937). There is no question that the required four-fifths vote was had. The attack is upon the content of the declaration. It reads: ". . . the City Council . . . have observed an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as 'hippies', and finds that unless proper regulations are adopted immediately, the use and enjoyment of property will be jeopar-

dized, if not entirely eliminated; the public parks and beaches are, in many cases, rendered unfit for normal public use by the unregulated and uncontrolled conduct of the new transients."

The declaration of the council is prima facie evidence of the existence of an emergency (*Potter v. City of Compton,* 15 Cal.App.2d 232, 237 [59 P.2d 537]) and places the burden upon the one attacking it (*Los Angeles Dredging Co. v. Long Beach,* 210 Cal. 348, 358 [291 P. 839, 71 A.L.R. 161]), but there must be a statement of the facts establishing urgency (Gov. Code, § 36937; *Morgan v. City of Long Beach,* 57 Cal. App. 134, 138 [207 P. 53]).

Appellant contends that only conclusions, and no facts, are contained in the declaration here. But the declaration does state that there has been an extraordinary influx of people to the city; that unless regulations are adopted at once, the enjoyment of public property will be jeopardized if not entirely eliminated; and that the public parks and beaches are being rendered unfit for public use by this influx. These are facts, and if true as the council found them to be, they show a sudden increase in use of public parks which required regulation to avoid destruction of these facilities.

But appellant argues that the discriminatory statements of the declarations void it. As we have pointed out, the ordinance itself contains no suggestion of arbitrary or discriminatory intent, and the circumstances of the present case strongly negate discriminatory application of the ordinance even though review

of ordinance and facts is made with the fullest coloration which can be attributed to the discriminatory statements in the declaration of urgency.

The declaration's reference to "undesirable and unsanitary visitors . . . sometimes known as 'hippies'" is unfortunate. Although no authority is cited, we may assume, without deciding, that if the true motive for the urgency clause was discriminatory, it would defeat the clause. But the declaration in fact recites an influx of persons to the city and a resultant overuse of parks. The conclusionary description of these people, in light of the ordinance itself and the facts of its application, may be disregarded as immaterial. Whether the newcomers were hirsute and unsanitary transients, or bald doctors who scrubbed with antiseptic soap often and who intended permanent residence, the essential fact still was the increased use of the parks. We cannot assume bad faith on the part of the city council (*Hadacheck v. Sebastian, supra,* 239 U.S. 394, 414). Under these circumstances, it would be an unauthorized extension of the judicial power to strike down the urgency clause.

We find no threat to First Amendment rights or to other constitutional guaranties in this regulation of the posture of appellant in the public parks of Carmel.

Judgment affirmed.

Draper, P. J.

Brown (H. C.), J., and Caldecott, J., concurred.

Filed March 23, 1970.

Lawrence R. Elkington, Clerk.

Appendix C

MINUTE ORDER

Superior Court of the State of California
for the County of Monterey

Date: November 1, 1968

Dept. No. 1, Hon. Anthony Brazil, Judge
June Lane, Deputy Clerk
Jean Archaubault, Bailiff
Robert B. Dufton, Reporter
Proceedings: Law and Motion

86,214

Ann Kessinger Parr,

vs.

The Municipal Court of the Monterey-Carmel Judicial District.

Appearances:

For Plaintiff: Heisler & Stewart, by Herbert Schwartz

For Defendant: Perry & Burleigh, by William Burleigh

The Petition for Alternative Writ of Prohibition is denied.

Appendix D

ORDINANCE INVOLVED

DIVISION 14—REGULATION OF CONDUCT ON PUBLIC PROPERTY

697.01 DEFINITION. For the purpose of this Division, the words "public property" shall mean any publicly owned property within the City, except the traveled portion of public streets, and shall include any park, beach, sidewalk, curb, or any part of any public right-of-way devoted to any planting, forest or park-like use.

697.02 ACTS UNLAWFUL. On any public property it shall be unlawful for any person to:

1. *Buildings and Other Property*

(a) *Disfiguration and Removal.* Willfully mark, deface, disfigure, injure, tamper with, displace, or remove, any building, railing, bench, paving, paving material, water line, or any facilities or property and equipment of any public utilities or parts or appurtenances thereof, signs, notices, or placards, whether temporary or permanent, monuments, stakes, posts, or other boundary markers, wall or rock border, or other structures or equipment, facilities or public property or appurtenances whatever, either real or personal.

(b) *Restrooms and Washrooms.* Fail to cooperate in maintaining restrooms and washrooms

in a neat and sanitary condition. No person over the age of 6 years shall use the restrooms and washrooms designated for the opposite sex.

(c) *Removal of Natural Resources.* Without a City Permit, to dig and remove any beach sand, whether submerged or not, or any soil, rock, stones, trees, shrubs, or plants, down-timber or other wood or materials, except driftwood, or make any excavation by tool, equipment, blasting, or other means or agency, except that this shall not prohibit the construction of sand castles or other similar sand structures on the beach, utilizing natural materials found on the beach.

(d) *Erection of Structures.* Construct or erect any building or structure of whatever kind, whether permanent or temporary in character, any tent, fly or windbreak, or run or string any rope, cord, or wire into, upon, or across, any public property, except on special permit issued by the City Council.

(e) *Commit Nuisance.* Urinate or defecate, except in a public restroom.

2. *Trees, Shrubbery and Plants*

(a) *Injury and Removal.* Without a City permit, to damage, cut, carve, burn, transplant or remove any tree or plant or injure the bark or pick the flowers or seeds of any tree or plant. Nor shall any person attach any rope, wire, or

other contrivance to any tree or plant. No person shall dig in or otherwise disturb, or in any other way injure or impair the natural beauty or usefulness of any park area.

(b) *Climbing Trees, etc.* Climb any tree, or walk, stand or sit upon monuments, vases, fountains, railings, fences, planted areas, or upon any other property not designed or customarily used for such purposes, or to sit on any sidewalks or steps, or to lie or sit on any lawns.

3. *Refuse and Trash.* Drop, throw, place, discard, dump, leave or otherwise deposit any bottles, broken glass, garbage, ashes, paper, boxes, cans, dirt, rubbish, waste, refuse or other trash on any public property except in waste containers provided therefor. No such refuse or trash shall be placed in any waters in or contiguous to any park, beach, or planted area, or left anywhere on the grounds thereof.

4. *Loitering and Boisterousness.* Sleep on seats, benches, sidewalks, curbs, planters, walls, or other areas except beaches and dunes; engage in loud, boisterous, threatening, abusive, insulting or indecent language; block pedestrian traffic on the sidewalk or other walks, ways or footpaths devoted to pedestrian use; or engage in any disorderly conduct or behavior.

5. *Vending and Peddling.* Expose or offer for sale any article or thing, or station or place any stand, cart or vehicle for the transportation, sale, or display of any such article or thing, without first obtaining a license therefor.

6. *Advertising In A Park.* Announce, advertise, or call the public attention in any way to any article or service for sale or hire.

7. *Signs.* Paste, glue, tack, or otherwise post any sign, placard, advertisement, or inscription whatever, nor shall any person erect or cause to be erected any sign whatever on any public lands or highways or roads adjacent to a park, without first obtaining permission of the City Council.

70-125

Supreme Court, U.S.
FILED
JUL 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1585~~

CITY OF CARMEL-BY-THE-SEA, A Municipal Corporation, THE PEOPLE, Real Party in Interest,
Petitioner

vs.

ANN KESSINGER PARR,
Respondent

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

PAUL N. HALVONIK
CHARLES C. MARSON
American Civil Liberties Union
of Northern California
593 Market Street, Suite 250
San Francisco, California 94105
Telephone: (415) 433-2750

HERBERT A. SCHWARTZ
EDWARD G. BERNSTEIN
721 Lighthouse Avenue
P. O. Box 607
Pacific Grove, California 93950
Telephone: (408) 373-0703

FRANCIS HEISLER
RICHARD M. SILVER
Post Office Drawer 3996
Carmel, California 93921
Telephone: (408) 624-1202

Attorneys for Respondent

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Question presented	1
Summary of argument	1
I	
The Supreme Court of the United States will not review the decision of a state court where it rests on adequate and independent state grounds	2
II	
The Fourteenth Amendment to the Constitution and Sections 11 and 21 of Article I of the California Constitution are interpreted as substantially equivalent but independent by the California Supreme Court	3
III	
The explicit reliance by the California Supreme Court on the Fourteenth Amendment by necessary implication includes the adequate and independent state ground of Sections 11 and 21 of Article I of the California Constitution, unless the decision by the California Supreme Court indicates it acted solely by compulsion of the Fourteenth Amendment	6
Conclusion	7

Table of Authorities Cited

Cases

Pages

Department of Mental Hygiene v. Kirchner, 62 C.2d 586, 400 P.2d 321, 43 Cal.Rptr. 329 (1965) 3, 4, 7

Department of Mental Hygiene v. Kirchner, 380 U.S. 195, 85 S.Ct. 871, 12 L.Ed.2d 753 (1965) 2, 3

Estate of Rogers, 245 C.A.2d 101, 53 Cal.Rptr. 572 (1966) 5

Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945) 2

Codes

Carmel-by-the-Sea Municipal Code, Section 697.02(2)(b) ... 6

Revenue and Taxation Code, Section 13672 5

Welfare and Institutions Code, Section 6650 3

Constitutions

California Constitution:
Article I, Sections 11, 21 ..... 1, 2, 3, 5, 6

United States Constitution:
Fourteenth Amendment 2, 5, 6

Texts

7B Moore's Federal Practice, Section 1257 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1585

CITY OF CARMEL-BY-THE-SEA, A Municipal Corporation, THE PEOPLE, Real Party in Interest,

Petitioner,

vs.

ANN KESSINGER PARR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Is review of the decision of the Supreme Court of California inappropriate due to the existence of an independent and adequate state constitutional ground?

SUMMARY OF ARGUMENT

The California Supreme Court has ruled that Sections 11 and 21 of Article I of the California Consti-

tution are "substantially equivalent" to the Fourteenth Amendment of the Constitution of the United States. The Court has further ruled that those sections of the California Constitution are independent of the Fourteenth Amendment of the Constitution of the United States.

In the case at bar, the California Supreme Court found the municipal ordinance in question violates the Fourteenth Amendment of the United States Constitution. Respondent's contention is that inherent in that ruling, and necessarily included, is that the ordinance violated Sections 11 and 21 of Article I of the California Constitution as well. If this Court finds that contention to be valid then this petition for writ of certiorari should be denied because the decision below rested on an adequate and independent state ground.

I.

THE SUPREME COURT OF THE UNITED STATES WILL NOT REVIEW THE DECISION OF A STATE COURT WHERE IT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

The Supreme Court of the United States has long adhered to the principle that it will not review a judgment of a State Court which rests on adequate and independent state grounds. 7B Moore's Federal Practice §1257, citing *Herb v. Pitcairn,* 324 U.S. 117, 125, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

Thus, in *Department of Mental Hygiene v. Kirchner,* 380 U.S. 195, 85 S.Ct. 871, 12 L.Ed.2d 753 (1965)

where the California Supreme Court found that §6650 of the Welfare and Institutions Code violated the "equal protection clause", this Court on certiorari vacated the judgment below and remanded the case to the California Supreme Court. The Court said (380 U.S. at p. 198):

> ". . . we would have jurisdiction to review only if the federal ground had been the sole basis for the decision, or the State Constitution was interpreted under what the State Court deemed the compulsion of the Federal Constitution."

II.

THE FOURTEENTH AMENDMENT OF THE CONSTITUTION AND SECTIONS 11 AND 21 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION ARE INTERPRETED AS SUBSTANTIALLY EQUIVALENT BUT INDEPENDENT BY THE CALIFORNIA SUPREME COURT

Upon remand of *Department of Mental Hygiene v. Kirchner, supra,* the California Supreme Court held:

> "It has been and is our understanding that the Fourteenth Amendment to the federal Constitution, and sections 11 and 21 of Article I of the California Constitution provide generally equivalent but independent protections in their respective jurisdictions.
>
> "California Constitution, Article I, section 11, requires that 'All laws of a general nature shall have a uniform operation' and section 21 of the same article specifies that 'No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legis-

lature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall be granted to all citizens.' These provisions of our State Constitution have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution. While it is our view that we should reach the same conclusion under the Fourteenth Amendment we were (and we are) in any event independently constrained to the result we reached by sections 11 and 21 of article I of the California Constitution. We so conclude by our construction and application of California law, regardless of whether there is or is not compulsion to the same end by the federal Constitution. (See e.g., our subject decision at page 723 of 60 Cal.2d wherein we expressly disapprove 'Anything found in . . . McGilvery . . . contrary to the views herein expressed' specifically including the refusal to give effect to Article I, section 11 of the California Constitution as discussed at pages 754 (12) et seq of Department of Mental Hygiene v. McGilvery (1958) 50 Cal. 2d 742 (329 P.2d 689).

"Inasmuch as we did not act solely by compulsion of the Fourteenth Amendment, either directly or in construing or in applying state law, we reiterate our former decision as filed January 30, 1964, reported at 60 Cal.2d 716 (36 Cal.Rptr. 188, 388 P.2d 720).

"Let the remittitur issue forthwith."

Department of Mental Hygiene v. Kirchner, 62 C.2d 586, 588, 43 Cal.Rptr. 329, 400 P.2d 321 (1965).

It is clear, therefore, that where a California Court finds that a state or municipal measure is invalid because of its discriminatory effect, it must perforce violate the State constitutional requirement of equal protection found in Section 11 and 21 of Article I of the California Constitution, whether or not it further finds a violation of the Fourteenth Amendment of the Constitution.

The Court of Appeal in *Estate of Rogers*, 245 C.A. 2d 101, 53 Cal.Rptr. 572 (1966), said of Sections 11 and 21 of Article I of the California Constitution in passing on the validity of Section 13672 of the Revenue and Taxation Code (245 C.A.2d at p. 110):

> "Our discussion, so far, has been directed at Respondent's equal protection argument. We have noted that the trial Court held Section 13672 unconstitutional under various provisions of our State Constitution. It seems to us that our Courts have consistently applied the same criteria to the California Constitutional provisions involved, as are applicable to the equal protection clause. [Citation omitted]. No further discussion is therefore necessary."

III.

THE EXPLICIT RELIANCE BY THE CALIFORNIA SUPREME COURT ON THE FOURTEENTH AMENDMENT BY NECESSARY IMPLICATION INCLUDES THE ADEQUATE AND INDEPENDENT STATE GROUND OF SECTIONS 11 AND 21 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION, UNLESS THE DECISION BY THE CALIFORNIA SUPREME COURT INDICATES IT ACTED SOLELY BY COMPULSION OF THE FOURTEENTH AMENDMENT

The Court below in striking down Section 697.02, subdivision (2)(b) of the Municipal Code of the City of Carmel-by-the-Sea, set forth in Appendix D of Petitioner's brief, found its purposes discriminatory "in violation of the equal protection clause of the Fourteenth Amendment." In so doing, it specifically found that the ordinance discriminated "against an ill-defined social caste." *Parr v. Municipal Court,* 3 C.3d 861, 870 (1971). The Court said (3 C.3d at p. 870):

> "But we cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This Court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color."

Once the California Supreme Court found the ordinance invalid because it denied equal protection of the laws in that its purpose was "to single out a special group and stigmatize its members," it implicitly found the measure invalid under the California Constitution, *regardless of whether or not there*

was a "compulsion to the same end by the federal Constitution." Department of Mental Hygiene v. Kirchner, supra, at 588.

This Court should not grant certiorari in the face of its express rule to review only "if the federal ground had been the sole basis for decision", and the express pronouncements of the California Supreme Court that its interpretation of the California State Constitution is "substantially equivalent but independent of the equal protection clause of the Fourteenth Amendment of the United States Constitution."

CONCLUSION

This Court should deny certiorari and the judgment below should be affirmed.

Dated, San Francisco, California,
July 7, 1971.

Respectfully submitted,

PAUL N. HALVONIK
CHARLES C. MARSON
American Civil Liberties Union
of Northern California
HERBERT A. SCHWARTZ
EDWARD G. BERNSTEIN
FRANCIS HEISLER
RICHARD M. SILVER
Attorneys for Respondent